CAUGHMAN LUMBER, INC.

IBLA 99-22 Decided September 19, 2002

Appeal from a trespass action of the Cañon City District Office, Bureau of Land Management, assessing treble damages and costs for the unauthorized removal of forest products from the public lands. CO-050-7468.

Affirmed in part, set aside in part.

1. Trespass: Generally--Trespass: Measure of Damages

Under 43 CFR 9239.0-7, the unauthorized severance or removal of timber and forest products from public lands under the jurisdiction of the Department of the Interior is an act of trespass.

2. Trespass: Generally--Trespass Measure of Damages

A willful trespass results from "a knowing act or omission that constitutes the voluntary or conscious performance of a prohibited act or indifference to or reckless disregard for the law." 43 CFR 5400.0-5. Where a logging company was informed numerous times that it was responsible for marking boundaries between private lands it was authorized to log and public lands it was not, it must clearly delineate the boundaries prior to cutting. In failing to do so, the company acted with indifference to and in reckless disregard for the law, and BLM's assessment of damages for willful trespass was proper.

3. Administrative Procedure: Hearings--Trespass: Generally--Trespass: Measure of Damages

The Board will not affirm an indirect cost assessment associated with prosecution of a trespass action by BLM where BLM has not itemized and justified the basis for the assessment in the administrative record.

APPEARANCES: Franklin E. Lynch, Esq., and Derry Beach Adams, Esq., Colorado Springs, Colorado, for Caughman Lumber, Inc.; Brock Wood, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Caughman Lumber, Inc. (CLI), has appealed from the September 10, 1998, decision of the Cañon City (Colorado) District Office, Bureau of Land Management (BLM), assessing treble damages and costs in the amount of $73,246.34 for the unauthorized removal of forest products from Federally-owned lands. 1/ This is the third in a series of appeals from trespass actions BLM initiated against CLI for removal of Federally-owned timber while CLI was logging lands owned by Frank and Alfred Black located in T. 50 N., R. 11 E., NMPM. 2/ All aliquot parts referred to below are in that township.

On July 31, 1998, the Cañon City District Manager advised CLI that BLM was initiating trespass proceedings against it based upon an investigation that revealed that it or its employees removed timber from the public lands in the S½NE¼, sec. 8, and from lots 2 and 3, sec. 9. (Ex. 10.) 3/ The letter to CLI included a trespass notice alleging that CLI cut or removed 69 MBF (thousand board feet) of spruce and Douglas-fir sawlogs and 41 CCF (hundred cubic feet) of products other than logs. The notice alleged that, in removing the timber and forest products, CLI had violated the secs. 102(a)(9), 302(b), and 303(g) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1702(a)(9), 1732(b), and 1733(g) (1994), and 43 CFR 9239.0-7. The letter allowed CLI 30 days within which to show that it or its employees were not in trespass or that the trespass was not willful.

_____

1/ CLI is a corporate entity that, throughout the duration of the alleged trespass, was owned "in its entirety" by Leslie G. Caughman, President. (Decision at 1.) While the file contains no direct information concerning the corporate structure of CLI, it appears that, at that time, CLI was a small corporation with three employees logging the Black property--Michael E. Mosher, Monte Church, and Ignacio "Patch" Ontiveros. (Administrative Record (AR), Exs. 66, 69, 64, 48.) This opinion will refer to Caughman the individual as Leslie Caughman and to the corporation as CLI.

2/ The first appeal decided by the Board, IBLA 96-70, pertaining to lands located in sec. 27, T. 50 N., R. 11 E., was referred for administrative hearing. Caughman Lumber, Inc., IBLA 96-70, Order dated Jan. 22, 1996. The second appeal, IBLA 94-793, affirmed BLM's decisions finding CLI in trespass on lands located in secs. 7 and 18, T. 50 N., R. 11 E. Caughman Lumber, Inc., 142 IBLA 192 (1998).

3/ The documents in the administrative record have been numbered by document. This opinion will refer to these documents as "exhibits (Exs.)" and will designate them both by exhibit number and page number within the exhibit, when appropriate.

The record does not reflect that CLI responded to the trespass charges at that time. BLM subsequently prepared a statement of damages, based upon its evaluation that the 69 MBF of sawlogs had a fair market value of $16,041.34, and that the 41 CCF of aspen products other than logs had a fair market value of $697.27. The value of those resources was tripled to reflect that BLM deemed the trespass to be willful, for a total trespass assessment of $50,215.83. In addition, personnel costs were assessed at $11,171.34; overhead costs at $11,173.17; vehicle costs at $506; and miscellaneous costs (brass cap survey markers replacing those destroyed by CLI) at $180. The trespass bill for collection thus levied a total of $73,246.34 against CLI.

Notwithstanding its previous failure to challenge BLM's trespass notice, CLI has disputed the factual basis of BLM's demand in its statement of reasons (SOR) for appeal. CLI admits that it cut timber from private property owned by Frank and Alfred Black adjacent to Federal lands pursuant to terms of a contract between Leslie Caughman and the Blacks, but avers that its employees were instructed not to cut on Federal lands and that, if they did, they did so inadvertently and not willfully. (SOR at 2-3.) CLI generally denies having committed the trespass, arguing that "[i]f a trespass occurred on property identified in the Trespass Decision, the trespass was committed by other individuals or entities over whom CLI had no control or right of control." CLI contends that "[e]vidence in the Bureau's file is conclusory and does not provide a factual basis to support the determination that CLI trespassed and caused the damages alleged."

CLI further contends that damages were erroneously assessed, particularly with regard to damages for "personnel costs," which it alleges "are not among those listed as a measure of damages for trespass actions pursuant to 43 CFR 9239.1-3." It alleges that "no documentation has been provided to demonstrate how the personnel costs were incurred or calculated to provide the basis for the expansive measure of damages." It maintains that in December 1995 BLM presented the U.S. Attorney's Office with a request for $23,000 in restitution which the U.S. Attorney declined to prosecute; CLI questions how damages can now be assessed at over $50,000 more than that amount. (SOR at 3.)

Finally, CLI requests an evidentiary hearing on the basis that

> [t]here are significant disputed issues of material fact presented in this case that have not been resolved * * * . The Bureau provides no factual determinations that serve as the basis for the Trespass Decision other than CLI's failure to provide any information to the contrary. No due process has been afforded CLI. The case file and additional documents from Special Agent John Silence as presented herein demonstrate that the factual information from the government to support the trespass is highly conflicting and insufficient to establish the alleged trespass.

(SOR at 4.)

In response, BLM asserts that this trespass is one of three trespasses on Federal lands in Fremont County, Colorado, that occurred while CLI was logging on land owned by Frank and Alfred Black. BLM maintains that CLI acted imprudently by not establishing boundary lines on the land deeded to the Blacks, since "Fremont County is a 'broken mix' of BLM administered public lands * * *, National Forest lands, state lands and private deeded property," where "sections are generally not square and the section lines only occasionally run true north/south/east/west." (Answer at 1-2.) BLM maintains that no other logging companies were operating in the vicinity of the trespass, that CLI employees admitted cutting "in the vicinity of the trespass," and that CLI instructed them where to cut, including "beyond a line of flags marking the boundary between the private land and the BLM land." (Answer at 2.) BLM maintains that the record establishes a willful trespass, as it reveals that "CLI recklessly did not exercise care in ascertaining the location of the boundary line" between BLM and private lands. Furthermore, BLM argues that the failure to establish a boundary line was intentional, as it provided CLI with an excuse for maintaining that any trespass that may have occurred was "accidental." (Answer at 3.)

With regard to damages, BLM states that 43 CFR 9239.1-3 provides that "unless state law provides stricter penalties, the Federally mandated damages will apply." (Answer at 6.) BLM responds that appellant has confused "personnel costs" with "overhead costs," which refer to "administrative costs incurred by the United States as a consequence of the trespass." According to BLM, personnel costs attributable to prosecution of the trespass are documented in the record at Ex. 11. BLM explains that overhead costs are "a flat fee of 18% on any monies received by the BLM merely to process the money." Id. BLM refers to the record (at Exs. 9 and 11) for an explanation as to how damages were calculated. (Id.)

[1] Under 43 CFR 9239.0-7, the unauthorized extraction, severance, injury, or removal of timber from public lands under the jurisdiction of the Department of the Interior is an act of trespass for which damages are properly assessed. When BLM discovers that timber has been severed or removed without permission from lands under its management, it may properly deem such action to be a trespass. John Williams, 139 IBLA 186 (1997); Fred Wolske, 137 IBLA 211 (1996).

In October 1992, Les Caughman and CLI entered into a contract to purchase timber from Frank and Alfred Black. The contract indicated that CLI was responsible for "any arrangements with the BLM and establishing property lines." (Ex. 59.) Black did, however, provide CLI with a crude map of secs. 4 through 9, 16 through 18, and 20, showing his boundaries. (Ex. 54.) This map accurately portrays the approximate location of the Black boundaries, as confirmed by BLM's map. (Ex. 64-4.)

Black's map reveals that the Black property is broken into two pieces, the smaller and more northern of which is at issue here. 4/ It is a rectangular tract straddling the east-to-west section line between secs. 4 and 9 and secs. 5 and 8. For simplicity, we shall refer to that tract as the "Black parcel."

The Black parcel includes the N½NW¼, and the NW¼NW¼ of sec. 9. (Ex. 57-2 and 57-3.) The trespass occurred on Federal lands in Lot 1 of sec. 9 (which borders the Black parcel to the east) and in Lots 2, 3, 4, and 5 of sec. 9 (which border the Black parcel to the south). (Exs. 55-5, 57-3; and 62-4.) 5/

In the early summer of 1993, Jim Cunio (BLM District Forester) and Les Caughman visited the "approximate east boundary of the private deeded land," and Cunio flagged a tree representing what he believed to be the boundary separating public and private ground at that point. He also explained to Les Caughman in broad terms that he believed the south boundary of the northern parcel to be north of a particular stand of aspen trees. (Ex. 57.) During the summer of 1993 two CLI employees, Mosher and Ontiveros, began cutting and skidding timber east and south of Black's boundary (Ex. 48.) They stopped in 1993 because Ontiveros was sent to another location. Id.

In connection with BLM's prosecution of CLI for removal of Federally-owned timber previous to this appeal (see n.1), on February 1, 1994, BLM notified CLI in a trespass notice that BLM would not establish boundary lines between Federal and the private property under logging contract to CLI. On April 18, 1994, BLM again notified CLI that BLM would not survey boundaries between public and private lands, but would "help with MTPs and Survey note interpretation." This letter was returned undelivered. (Ex. 58.)

Mosher and Ontiveros resumed cutting outside the Black boundaries in the summer of 1994. (Ex. 48.) This trespass action was initiated on August 24, 1994, when BLM Forester Cunio filed a "Report of Unauthorized Use" with the Cañon City District Office for "timber theft" after observing that timber had been cut on Federal lands in lot 1, sec. 9, near private deeded land owned by Frank and Alfred Black being logged by CLI. The report noted that Cunio had flagged the "approximate boundary" in the summer of 1993, and that flagging was still in place on August 24, 1994. (Ex. 68.) On August 24, Cunio flagged boundary lines between Federal and Black lands in section 8, after establishing the line. After Cunio found several trees cut beyond the flags, Cunio talked with Mike Mosher, CLI's

---

4/ The larger Black parcel is located to the southwest. Federal lands in sec. 8 separate the two Black parcels. (Ex. 64-4.)

5/ BLM's trespass notice indicates that timber was removed from Federal lands in S½NE¼ sec. 8, and in Lots 2 and 3 sec. 9. That appears to be incorrect.

skidder operator. Mosher said CLI had told him to cut over the flagged boundary, as Frank Black had said they could cut 150 feet below the blue flags. Mosher claimed he had only cut there before the line was flagged. Cunio also informed Mosher that "the cutting to the north was also way onto BLM" lands. (Ex. 66.)

On September 1, 1994, BLM Forester Cunio and other BLM personnel encountered Les Caughman near the south corner between secs. 7 and 12. Les Caughman told Cunio that BLM was "telling him the boundary is in one place and Blacks are telling him something different." (Ex. 69.) Cunio suggested to Les Caughman that he employ surveyors to help him determine boundaries. At that time Les Caughman asked Cunio to "flag off the NW¼NW¼ Section 8, as Blacks wanted it cut." Cunio replied that he would not, but he would "put up two or three flags along the line to get him started * * * ." Cunio tied six flags "due east of the quarter corner between section 7 and 8" and told the skidder operator "to line the flags up behind him like a gun barrel and keep flagging, but he only had a ¼ mile from the brasscap [corner marker] before it was BLM again." Mosher asked Cunio how to know how far he had gone; Cunio suggested clocking the distance by car. Cunio observed that Mosher was then in possession of CLI's compass. Id.

On September 2, Cunio found Monte Church, also employed by CLI as a skidder and feller, limbing a large Douglas fir in the N½ sec. 8. Cunio told Church that he was cutting "so close to the line, it is totally spooky." At Cunio's suggestion, Church

> rode with me to the BLM boundary line in the meadow by the county road maybe 350 yards away. I gave him my silva compass and asked him to look down it and decide for himself whether he was on private or BLM. I said that I was not saying he was on BLM nor was I saying he was on private, but he was so close he could be on either. * * *
>
> * * * * * * *
>
> He asked how he would know where the line is and I said take Les's toy compass and set in 13 degrees of declination and go. He asked what direction would it be. I looked it up in the survey notes and told him 88 degrees.
>
> He asked if he could skid the logs he was working and I told him that I wouldn't skid them with a 3000' cable.

(Ex. 64.) On September 2, 1994, BLM served a cease and desist order on CLI alleging that the company had removed timber from Federal lands in S½NE¼ sec. 8 and Lots 2 and 3, sec. 9, despite verbal and written requests not to do so. (Ex. 65.)

On September 8, 1994, Cunio and nine other BLM employees conducted a cruise of the public lands surrounding the Black property to count

stumps that had been recently removed from Federal property. (Ex. 11.) During the cruise, the Black property lines were located and flagged, and personnel then measured each stump south and east of the flagged boundaries. The cruise revealed that "2117 trees were cut down or removed from 28.5 acres of public land" in the E½NE¼, SW¼NE¼, and the S½NW¼ sec. 9. (Ex. 55.)

We find the evidence in the record sufficient to substantiate a finding of trespass against CLI. The record contains sufficient evidence to establish that CLI or its agents engaged in the unauthorized removal of timber and forest products from the public lands. Appellant's unsubstantiated contention that the trees were felled by other parties is not credible.

[2] The Department recognizes two forms of trespass --"nonwillful" and "willful." Both terms are defined in the regulations. Departmental regulations define "willful" as "a knowing act or omission that constitutes the voluntary or conscious performance of a prohibited act or indifference to or reckless disregard for the law." 43 CFR 5400.0-5. In turn, "nonwillful" is defined in the same code section as "an action which is inadvertent, mitigated in character by the belief that the conduct is reasonable or legal."

Willful trespass has been found when the "vegetative material severed from the land in trespass is so far from the area permitted under a vegetative material sale contract that the act is reasonably deemed to be a conscious performance of a prohibited act or indifference to or reckless disregard of the law." J. W. Weaver, 124 IBLA 29 (1992). In Frehner Construction Co., Inc., 124 IBLA 310, 315 (1992), the Board quoted Dolch v. Ramsey, 134 P.2d 19, 22 (Cal. Dist. Ct. App. 1943), stating that the good faith of a trespasser

> should be measured, not entirely by the words he used in testifying, but by those words when weighed in the light of information easily available to him and the reasonable-
> ness of his conclusion when measured by what was in plain sight and what he could have learned by the use of his natural senses and the employment of reasonable prudence.

The Board also noted the decision in Liberty Bell Gold Mining Co. v. Smuggler-Union Mining Co., 203 F. 795, 799 (8th Cir.), cert. denied, 231 U.S. 747 (1913), which stated: "[I]f a person has the means of ascertaining facts, but refuses to use these means, and, reck-
less of the rights of the true owner, appropriates his property to his own use, the law will presume that he did it intentionally and willfully." Frehner Construction Co., supra.

The record before us supports a finding that CLI engaged in willful trespass. CLI was informed numerous times that it was responsible for marking Black's boundaries. The "employment of reasonable prudence" requires that the boundaries be clearly delineated prior to cutting. If either CLI or its employees did not possess the expertise to mark the boundaries, reasonable prudence dictates that CLI should have hired surveyors to mark them. In failing to do so, CLI acted with indifference to and in reckless disregard for the law.

[3] We next turn to the question of damages. On appeal, an assessment of damages made by the BLM for timber trespass will not be disturbed where neither the appellant's contentions nor the record otherwise proves that the BLM determination was in error. David Robinson, 36 IBLA 386 (1978). Where an appellant does not take issue with the details of BLM's assessment of liability, the assessment is properly affirmed. Michael and Karen Rodgers, 137 IBLA 131, 135 (1996); Double J Land & Cattle Co., 126 IBLA 101, 109 (1993).

With regard to calculating the measure of damages, Departmental regulations provide, in pertinent part:

> (a) Unless State law provides stricter penalties, in which case the State law shall prevail, the following minimum damages apply to trespass of timber and other vegetative resources:
>
> > (1) Administrative costs incurred by the United States as a consequence of the trespass.
> >
> > (2) Costs associated with the rehabilitation and stabilization of any resources damaged as a result of the trespass.
> >
> > (3) Twice the fair market value of the resource at the time of the trespass when the violation was nonwillful, and 3 times the fair market value at the time of the trespass when the violation was willful.

43 CFR 9239.1-3.

As we stated earlier, BLM calculated damages based upon an evaluation that 69 MFB of sawlogs having a fair market value of $232.48 per MBF, or $16,041.34, were removed from public lands, and 41 CCF of aspen products other than logs having a fair market value of $697.27 were removed. The value of these resources was tripled to reflect that BLM deemed the trespass to be willful, for a total trespass assessment of $50,215.83. Personnel costs were assessed at $11,171.34, overhead costs at $11,173.17, vehicle costs at $506, and miscellaneous costs (brass cap survey markers) at $180. The trespass bill for collection thus levied a total of $73,246.34 against CLI.

Appellant claims that the $73,246.34 in damages assessed by BLM are excessive when compared with the $23,000 requested by BLM in restitution in its petition to the U.S. Attorney. Appellant further claims that "personnel costs" of "$11,173.34" are not documented in the record, and "are not among those listed as a measure of damages for trespass actions pursuant to 43 CFR 9239.1-3." However, appellant does not contest the amount of timber and other forest products removed from the public lands nor the market value assessed for the timber and other products.

We reject appellant's argument that BLM's damage assessment is arbitrary simply because it exceeds damages requested in a criminal action that was never prosecuted. The questions before us are, does the damage assessment comport with 43 CFR 9239.1-3, and is it supported by the record?

The trespass notice based the damage assessment upon a November 8, 1994, Memorandum compiled by the Cañon City District Office listing the results of a stump count, timber tally, and value calculations conducted by Jim Cunio and BLM staff. (Exs. 55 and 62). The November 1994 Memorandum details how property lines were determined and how volume and value calculations were made. Appellant has not challenged these findings. With respect to the damages assessment, we are satisfied that the record supports the $50,215.83 assessed for the treble value of logs and forest products removed from Federal lands. We therefore affirm BLM's damage assessment pertaining to value of products removed. 6/

Administrative costs were documented primarily in Exhibit 11. Vehicle usage by BLM employees in connection with prosecuting the trespass was based on miles driven times a standard mileage rate. Total amount assessed for mileage was $506.09. Miscellaneous charges to replace six brass cap boundary markers at $30 per marker disturbed by CLI logging were assessed at $180. (Ex. 11-2.) Also included in Exhibit 11 is documentation of BLM's expenditures in terms of personnel detailed to monitor the CLI trespass. These costs are tracked by date, employee, number of hours detailed, and hourly rate per employee. BLM has documented in the record that $11,171.34 in specific personnel costs are

_____

6/ The Nov. 8, 1994, Memorandum to the State Director assessing damages associates the trespass with the E½NE¼, SW¼NE¼, and the S½NW¼, sec. 9. The trespass decision, however, charges that the trespass occurred in the S½NE¼, sec. 8, and lots 2 and 3, sec. 9. Thus, the trespass decision, which finds a trespass in the S½NE¼, sec. 8 and lots 2 and 3, sec. 9, assesses damages for a trespass occurring in the E½NE¼, SW¼NE¼, and the S½NW¼, sec. 9. When compared with the cruise, the trespass decision appears to improperly place the trespass, although it is clear from the map attached to Ex. 64 that Monte Church was observed cutting timber in section 8, and a computer-generated composite map attached to the November 8, 1994, Memorandum appears to depict the trespass extending into section 8. (Ex. 55 at 6.) At any rate, to the extent there are inconsistencies between the trespass decision and the cruise concerning the location of the trespass, the cruise will control the assessment of damages.

attributable to this trespass. We find that the record supports the assessments made to reimburse BLM for the administrative costs of personnel, vehicles, and miscellaneous charges incurred in order to prosecute the trespass.

The basis for the "overhead" assessment of $11,173.17, however, is not well documented. BLM avers that the assessment is an administrative cost levied by the "National Business Center, BLM Denver," assessed "on any monies received by the BLM merely to process the money." (BLM Answer at 6.) According to BLM, this assessment is over and above personnel costs specific to prosecution of the trespass, and, as a percentage, is based upon the total of all other monies assessed. Id.

We presume that the "overhead" assessment was based on the BLM Manual at H-9232-1, VII.E.3 (Rel. 9-300 (8/14/89)), pertaining to the calculation of "indirect administrative costs." That section provides for a "Bureauwide indirect cost rate," which "covers the Bureau's costs of providing administrative support services (including those which cannot be identified as a direct cost) incurred as a consequence of the trespass." According to the Manual, "this rate is calculated and provided to Field Offices each year by the Bureau's WO Division of Finance." The Manual indicates that "[t]he total administrative cost is arrived at by multiplying the sum of the total labor costs and operation costs by one plus the indirect cost rate." Id.

BLM has not provided the Board with sufficient documentation of how the 18 percent multiplier is justified. 7/ This cost, therefore, has not been sufficiently itemized in the record. Consequently, we cannot affirm even a reduced assessment for indirect costs. See Mike Sprunger, 150 IBLA 64, 74 (1999). Therefore, we find that the record supports a damage assessment of $62,073.17 ($73,246.34 less $11,173.17) only. BLM's decision is set aside to the extent that it assessed an amount greater than $62,073.17.

Appellant requested a fact-finding hearing on the basis that [t]here are significant disputed issues of material fact presented in this case that have not been resolved * * *." Under 43 CFR 4.415, hearings may be initiated on a party's request if there are material issues of fact that

7/ In this case, it is obvious from the record that BLM arrived at the overhead charge by multiplying the total damage assessment of $62,073.17 ($50,215.83 for value assessment + $11,857.37 for direct administrative costs) by 18 percent, which yielded an indirect overhead assessment of $11,173.17. However, the BLM Manual specifies that only the "sum of the total labor costs and operations costs" shall be multiplied by the indirect cost rate. This would yield the following equation: $ll,857.37 x .18 = $2,134.32.

cannot be resolved on the basis of the record before the Board. See Pine Grove Farms, 126 IBLA 269, 274 (1993); Lazy VD Land & Livestock Co., 108 IBLA 224 (1989). As this appeal presented no material issues of fact that could not be resolved on the basis of the record before us, appellant's request is hereby denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's decision is affirmed in part and set aside in part.

David L. Hughes
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge